IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 20TH JULY 2006 / 29TH ASHADHA,1928

CRL.A.No. 1229 of 2002()

SC.262/1999 of ADDL. SESSIONS COURT (ADHOC), KOZHIKODE

.....

APPELLANT: ACCUSED

SHAMBU, AGED 34,
S/O. MOOTHARAKUTTY, CHENKURIMMAL HOUSE,
KUNATHARA, ATHOLY, KOZHIKODE.

BY ADV. SRI.VARGHESE C.KURIAKOSE
SRI.P.SANTHARAM.
SRI.P.SANTHARAM.

RESPONDENTS: COMPLAINANTS

STATE OF KERALA, REPRESENTED BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR ADV.SRI.THAVAMONY

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20/07/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.HEMA, J.

CRL.A.NO. 1229 OF 2002

Dated this the 20th day of July, 2006

JUDGMENT

This appeal arises from conviction and sentence passed against the appellant for an offence under Section 55(g) of the Abkari Act. The appellant was sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.1,00,000/- and in default, to undergo simple imprisonment for a further period of nine months.

2. According to prosecution, PW1, Sub Inspector of Police, along with the police party was on patrol duty on 4.9.1998 at about 6.30 p.m. On getting information that the accused was distilling illicit liquor from his house, they proceeded to the house of the accused. On reaching there, the accused was found standing on the courtyard of the house engaged in distilling arrack using about 40 litres of wash, utensils and stills designed for distilling arrack found in the courtyard of the appellant's house were seized under Exhibit P1 mahazar. The appellant was arrested from the scene of occurrence, after complying with the formalities of seizure, drawing of sample, preparation of mahazar etc. The remaining wash was destroyed in the place of occurrence itself. The accused was charge sheeted for offences under Section 55(b) and 55(g) of the Abkari Act.

3. Evidence was adduced. The prosecution examined Pws 1 to 5, marked Exhibits P1 to P6 and MO1 to MO3. Accused did not adduce any defence evidence. On an evaluation of the evidence, the court below found that the accused is guilty of offence under Section 55(g) of the Abkari Act and he was sentenced accordingly.

4. Learned counsel for the appellant contended that the search and seizure are in violation of the provisions contained in the Abkari Act and hence the accused is entitled for acquittal. Evidence in this case would discloses that PW1, the Sub Inspector of Police and the police party proceeded to the house of the accused on getting information that he was distilling arrack from his house and on reaching there, he was found making preparation for manufacturing arrack. He was found on the northern courtyard of his house. Utensils were kept on the courtyard and he was found standing nearby. Twenty litres of wash was found in an aluminium vessel having a capacity of 40 litres. The accused was arrested at the spot.

5. It is clear from the evidence of Pws 2, 3 and 4 that the police party proceeded to the place of occurrence on getting information regarding the commission of offence by the accused. According to them, the accused was manufacturing liquor from his house. If a search has to be made, the detecting officer was bound to follow the procedure laid down in the Criminal Procedure Code. But no search memo was prepared.

Instead, the police party proceeded to the house of the accused and on reaching there, the accused was found standing on the courtyard on the northern side and as per the evidence, he was engaged in distilling arrack. The articles found nearby were seized.

6. The evidence discloses that search is not from an enclosed place. Further, it is not a public place also. It is from the courtyard of the house of the accused. In the case of search from open place, Section 34 of the Abkari Act will apply. Section 34 provides that the provisions of the Criminal Procedure Code shall apply in so far as they are not in consistent with the provisions of the Abkari Act to the arrest, searches and seizure made under the Act. Section 36 of the Abkari Act provides that all searches under the provisions of the Act shall be made in accordance with the provisions of the Code. As per the proviso to Section 36, the persons called upon to attend and witness, such searches shall include at least two persons neither of whom is an Abkari, Police or a Village Officer.

7. This scope of Section 36 in the case of search from open place has been considered by this Court in the decision reported in ***Ramachandran Nair v. State*** (1990(1) KLT 44). It is laid down in the said decision as follows:

> ".....The words "persons called upon to attend and witness such searches shall include at least two persons" indicate the legislative insistence for strict compliance with the proviso. When the statute uses

> expressions such as "at least", it must be understood that it denotes the minimum number required for its performance. When it falls below the minimum number the officer who makes the search has a duty to explain the reason for not adhering to the minimum requirement. If such explanation is acceptable to court, the seizure or search may not get vitiated. But no hard and fast rule can be laid down that, that non-compliance with statutory conditions will or will not vitiate the action made by the officer....."

8. Doubting the correctness of this decision in the light of another decision reported in ***Job v. State of Kerala*** (1991(1) KLT 491) a reference was made by a Division Bench of this Court. The Division Bench considered the matter in ***Madhavan v. Excise Inspector*** (2000(1) KLT 311). It was held in **Job's case** (1991(1) KLT 491) that **Ramachandran's case** (1990(1) KLT 44) must be understood in the light of the decision of the Supreme Court and could apply to search place and not a person. It was also held that even in the matter of search of place, non-compliance of the proviso could be explained to the satisfaction of the court. Therefore, it is clear that the decision in **Ramachandran's case** (1990(1) KLT 44) will apply to a search in an open place.

9. The decision reported in **Job's case** (1991(1) KLT 491) was upheld by the Division Bench. It was held by the Division Bench that on the facts and circumstances of each case, the effect of non-compliance is to be examined. It was also held that Section 36 only provides safeguard

during search and even if there is any infraction, that will not vitiate the trial if materials brought on record justified in conviction. It is for the court to decide what weight can be attached to the evidence in this regard. The Division Bench was following the dictum laid down in the decision reported in ***State of Punjab v. Baldev Singh*** (AIR 1999 SC 2378) wherein it is held that an illicit article seized from the person of an accused, during search conducted in violation of the safeguards provided in Section 50 of the Abkari Act cannot be used as an evidence of proof of unlawful possession of the contraband on the accused, though any other materials recovered during that search may be relied upon by the prosecution in other proceedings against the accused notwithstanding the recovery of that material during an illegal search. From a reading of these decisions referred to by me earlier, it can be concluded that a mere violation of Section 36 itself may not be sufficient to vitiate the trial. But the court has to assess the evidence on record and find out whether materials collected or the illicit article seized from the possession of the accused in violation of the safeguards provided in a particular Section. If it was in such violation the materials collected in such search cannot be used as evidence of proof of unlawful possession of the contraband, even though it may be used for other purposes.

10.Bearing these principles in mind, if the evidence in this case is analysed, it can be seen that there is clear infraction of Section 36 of the

Act. PW2, Sub Inspector of Police and all other official witnesses have deposed that no independent witness was called upon to witness the search. Exhibit P1 mahazar would also show that no independent witness signed the mahazar prepared in connection with the search and seizure. The only witnesses to Exhibit P1 are the official witnesses. Therefore, there is clear violation of the proviso to Section 36 of the Abkari Act. The question is whether the prosecution has given any plausible explanation for violation of Section 34 of the Abkari Act.

11. The evidence of the official witness would go to show that there are houses close to the place of occurrence and those houses are inhabited. It is also clear from the evidence that witnesses were available for the search. But PW2 did not call upon any independent witness for the search. The explanation given is that no male persons are available in the neighbourhood. It has come out in evidence that there were women in the neighbourhood who could have been called to witness the search. The provision does not mention whether the independent witness has to be a male or female. If these witnesses are available for witnessing the incident, the officer ought to have called upon such witnesses to attend the search. But it was not done. The explanation offered by the prosecution for violation of Section 36 is not at all acceptable.

12. In the above circumstances, I hold that the search conducted in this case and the seizure of the illicit article are in violation of Section 36 of

the Abkari Act. Therefore, the article so recovered in violation of the safeguard in Section 36 of the Abkari Act cannot be used for proof of possession of the contraband article by the accused. Hence the prosecution failed to establish that the accused was in possession of the contraband articles seized from the place of occurrence as alleged by the prosecution. The accused is, therefore, entitled for acquittal on this ground itself.

In the result, the conviction and sentence passed against the accused are set aside and the accused is found not guilty of offences under Sections 55(b) and 55(g) of the Abkari Act. He is set at liberty forthwith. The appeal is allowed.

K.HEMA, JUDGE

vgs.

K.HEMA, J.

Crl.A.NO.1229 OF 2002

JUDGMENT

20.7.2006